

Accident Compensation Entitlements Under the Property (Relationships) Act 1976

Simon Connell* and Nicola Peart**

I Introduction

The Property (Relationships) Act 1976 ('the PRA') provides that, after the end of a marriage, civil union, or de facto relationship of three or more years' duration, the parties' relationship property is equally shared unless they have formally agreed otherwise or one of the limited exceptions to equal division applies.¹ This article considers how the PRA interacts with accident compensation entitlements. We approach this issue by asking:

- The 'classification question': when will an accident compensation entitlement be 'relationship property'?
- The 'division question': do accident compensation entitlements that are relationship property affect the division of relationship property?

The classification question received recent judicial attention from Mander J in the High Court in *Bowden v Bowden*,² a case concerning the division of the estate of Gordon Bowden, who died of asbestosis in 2012. He was survived by Judith Bowden,³ his de facto partner of three years and two days,⁴ and his adult son from a prior marriage, Paul Bowden.

Mr Bowden was diagnosed with asbestosis in 2010, for which the Accident Compensation Corporation accepted cover as a work-related injury. It paid Mr Bowden lump sum compensation of almost \$130,000 for his permanent physical impairment. Both the diagnosis and the ACC payment occurred during his de facto relationship with Judith Bowden. The exposure to asbestos, however, had occurred many years prior to that

* Lecturer in Law, University of Otago.

** Professor of Law, University of Otago.

¹ Property (Relationships) Act 1976, ss 11–14AA.

² *Bowden v Bowden* [2016] NZHC 1201, [2017] NZFLR 56.

³ Mrs Bowden changed her surname to Bowden by deed poll shortly after Mr Bowden's death, see *Bowden v Bowden* [2015] NZFC 8921 at [21].

⁴ Whether the parties were in a de facto relationship and, if so, when it commenced, were contested in the Family Court, see *Bowden v Bowden* (FC), above n 3, at [8]–[91]. The Family Court found at [90] that the relationship "moved to a new level" around late February to early March 2009 and Mr and Mrs Bowden became de facto partners at that time. The Family Court fixed a date of 27 February as the date of commencement of the relationship, being the date that Mrs Bowden gave notice to her landlord that she was terminating her tenancy. Given that the relationship ended on 1 March 2012 when Mr Bowden died, the Family Court found at [91] that the de facto relationship lasted three years and two days. Those findings were not appealed.

relationship when Mr Bowden was living and working in the UK.⁵ After Mr Bowden's death, a dispute arose between his surviving partner and his son over the division of his estate. Mr Bowden had made a will the day before he died, appointing his son as the executor and leaving him all of his estate. His estate comprised the family home, registered solely in his name, some \$30,000 in a bank account in his name, and about \$100,000 in a bank account in the joint names of the deceased and his son, which was found to be the balance of the ACC payment. Ms Bowden elected option A under the PRA, seeking a division of the couple's relationship property.⁶ She claimed that all of the estate was relationship property, including the ACC funds, and that she was entitled to a half share.

The Court thus had to consider:

- Whether the compensation payment was relationship property and, if so,
- whether the relationship property should be equally divided between Ms Bowden and the estate.⁷

In regard to classification, neither the Family Court nor the High Court considered the personal nature of the compensation. Applying the PRA's classification system, the question was whether the right to compensation accrued before or during the relationship.⁸ The Courts came to different conclusions on that question. The Family Court found that the right to compensation accrued when Mr Bowden suffered the injury, which was when he was exposed to asbestos.⁹ Since that happened many years prior to the commencement of the de facto relationship, the compensation payment was Mr Bowden's separate property and thus Ms Bowden had no entitlement to it. The High Court, on the other hand, held that the right to compensation accrued on the date that the accident compensation scheme deemed Mr Bowden to have suffered asbestosis, which was the date upon which the condition was diagnosed.¹⁰ Since diagnosis occurred during the relationship, the compensation payment was relationship property and subject to division.¹¹

⁵ As the High Court observed in *Bowden v Bowden*, above n 2, at [77] little information is available regarding the circumstances of Mr Bowden's claim and the subsequent compensation payment. We will take it as a given that Mr Bowden obtained cover and then received lump sum compensation for permanent impairment.

⁶ Property (Relationships) Act 1976, s 61.

⁷ Property (Relationships) Act 1976, ss 13 and 14A allow for unequal division. See further IIC below.

⁸ Property (Relationships) Act 1976, s 8(1)(e).

⁹ *Bowden v Bowden* (Family Court), above n 3, at [124].

¹⁰ Accident Compensation Act 2001, s 37. *Bowden v Bowden*, above n 2, at [79].

¹¹ In addition, that the condition arose during the relationship means that there is no question that ACC could decide, on reasonable grounds, that the main purpose of Mrs Bowden becoming Mr Bowden's partner was to qualify for ACC entitlements, which would have removed ACC's liability, see Accident Compensation Act 2001, sch 1, cl 75(3).

In regard to division, the High Court agreed with the Family Court that there were extraordinary circumstances that made equal sharing repugnant to justice, which is one of the exceptions to equal division,¹² and that a division of 80:20 in favour of Mr Bowden was appropriate.¹³ The relationship had lasted only three years and two days during which time the parties had kept their finances entirely separate and Mr Bowden's financial contributions had grossly exceeded Ms Bowden's financial and non-financial contributions.¹⁴ However, in contrast to the Family Court, where the ACC funds were not subject to division, they were in the High Court. These funds would have added significantly to the gross disparity in contributions, but the High Court did not refer to the ACC payments when addressing the division question and did not appear to see the increased disparity as a reason to adjust the 80:20 split in Mr Bowden's favour.¹⁵ The personal nature of the compensation was not mentioned.

Our concern is that the PRA does not allow the personal nature of accident compensation entitlements to be addressed appropriately. We begin with an overview of the relevant mechanics of the PRA and the Accident Compensation Act 2001 ('the ACA'). We will then discuss how the courts have analysed accident compensation entitlements in the context of relationship property claims. That discussion will reveal a poor alignment between the PRA and the ACA and conceptual difficulties, which have led to problems in application. We will conclude by suggesting reform to clarify the interaction between the PRA and the ACA.

II Overview of Relationship Property Entitlements

The PRA treats a marriage, civil union, or a de facto relationship that has lasted for three or more years as a partnership to which the parties are presumed to contribute equally, albeit in different ways.¹⁶ Hence, there is a presumption that the property associated with the relationship will be shared equally when the relationship ends.¹⁷ Equal division of relationship property is intended to reflect the parties' equal contribution

¹² Property (Relationships) Act 1976, s 13.

¹³ See *Bowden v Bowden*, above n 2, at [8] for a summary of the factors that the Family Court considered relevant.

¹⁴ See *Bowden v Bowden*, above n 2, at [8] for a summary of the factors that the Family Court considered relevant.

¹⁵ Interestingly, both the Family Court and the High Court dealt with s 13 before considering whether the ACC funds were part of the relationship property.

¹⁶ Property (Relationships) Act 1976, ss 1M(b) and 1N(a) and (b). *Reid v Reid* [1979] 1 NZLR 572 (CA).

¹⁷ Property (Relationships) Act 1976, ss 11–14AA.

to the partnership.¹⁸ In keeping with this principle, only “relationship property” is shared.¹⁹ ‘Separate property’ is retained by the owner.

A *Meaning of property*

The PRA applies to “property” that is beneficially owned by either of the parties.²⁰ Property is defined as including:²¹

- real property:
- personal property:
- any estate or interest in any real property or personal property:
- any debt or any thing in action:
- any other right or interest.

Although this definition is similar to property definitions in other statutes,²² suggesting a conventional understanding of the concept, property is a social construct and has been viewed as a fluid concept in the context of the PRA.²³ As the Supreme Court observed recently in *Clayton v Clayton*, affirming a much earlier observation of the Court of Appeal in *Z v Z No 2*, “its meaning and scope [is] affected by the statutory and wider context (including changing social values, economic interests and technological developments) in which it is used”.²⁴

When construing its meaning in the context of social legislation, such as the PRA, traditional concepts of property may be broadened to include rights and interests that would not be regarded as property in other contexts.²⁵ In *Clayton* the combination of powers held by the husband in relation to a trust were held to constitute property for purposes of his wife’s PRA claim.²⁶ So was the husband’s entitlement to super profits in *Z v Z No 2*.²⁷

¹⁸ *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 267, citing the second reading of the Matrimonial Property Bill at NZPD vol 408, 7 December 1976 at p 4565.

¹⁹ Property (Relationships) Act 1976, s 11. See II B below for an explanation of “relationship property”.

²⁰ Property (Relationships) Act 1976, s 2, definition of “owner”.

²¹ Property (Relationships) Act 1976, s 2, definition of “property”.

²² For example, the Property Law Act 1952, Crimes Act 1961, Child Support Act 1991 and the Family Proceedings Act 1980.

²³ *Z v Z (No 2)*, above n 18, at 279.

²⁴ *Clayton v Clayton* [2016] NZSC 29 at [30], referring with approval to *Z v Z (No 2)*, above n 18, at 279.

²⁵ *Clayton v Clayton*, above n 24, at [38].

²⁶ Mr Clayton’s extensive powers in relation to the Vaughan Road Property Trust allowed him to appoint all of the capital and income of the trust to himself without being constrained by fiduciary duties: *Clayton v Clayton*, above n 24, at [58].

²⁷ The super profits are the earnings the husband would receive as a partner in excess of the remuneration for his own skills and effort. These earnings were part of the bundle of rights associated with the husband’s interest in the accountancy partnership: *Z v Z (No 2)*, above n 18, at 291.

However, property is confined to rights in things. It does not include rights in respect of the person. A person's intelligence, memory, physical strength, or sporting prowess are personal characteristics and part of an individual's overall makeup. They are not property.²⁸ That led the Court of Appeal in *Z v Z No 2* to conclude that the husband's enhanced earning capacity was not property.²⁹ Nor were the husband's business skills and abilities in *Thompson v Thompson*.³⁰ However, the payment that the purchaser of Mr Thompson's business made for his restraint of trade covenant was property, because that covenant protected the business goodwill purchased by the buyer.³¹ Mr Thompson's promise not to use his skills and abilities to compete against the business he had sold was part of the value of the business that the purchaser had bought.

B Classification

All property owned by either of the parties is classified as either relationship property or separate property. Property that is not relationship property is "separate property".³² "Relationship property" is exhaustively defined in the Act.³³ It includes the family home and family chattels, whenever they were acquired;³⁴ all property owned by the parties jointly or in common in equal shares;³⁵ property acquired by either party in contemplation of the relationship and intended for the common use or common benefit of both parties;³⁶ and all property acquired by either party during the relationship,³⁷ other than property acquired from a third party by way of gift, succession, survivorship or as a beneficiary of a trust settled by a third party.³⁸ These excluded assets are not produced by the partnership and hence remain the separate property of the recipient partner unless the assets are, or have become part of, the

²⁸ *Z v Z (No 2)*, above n 18, at 279.

²⁹ *Z v Z (No 2)*, above n 18, at 280. That is still the position under the Property (Relationships) Act 1976. The amendments made in 2001 did not change the definition of property, or include earning capacity in its definition of relationship property. Instead, it gave the Court power to compensate for significant economic disparity resulting from the division of functions during the marriage: Property (Relationships) Act 1976, s 15. See Mark Henaghan "Sharing Family Finances at the End of a Relationship" in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (Intersentia, Cambridge) (forthcoming).

³⁰ *Thompson v Thompson* [2014] NZCA 117, [2014] 2 NZLR 741 at [76]; *Thompson v Thompson* [2015] NZSC 26, [2015] 1 NZLR 593 at [53].

³¹ *Z v Z (No 1)* [1989] 3 NZLR 413 (CA) at 415; *Thompson v Thompson* (SC), above n 30, at [71].

³² Property (Relationships) Act 1976, s 9(1).

³³ Property (Relationships) Act 1976, ss 8–10.

³⁴ Property (Relationships) Act 1976, s 8(1)(a) and (b).

³⁵ Property (Relationships) Act 1976, s 8(1)(c).

³⁶ Property (Relationships) Act 1976, s 8(1)(d).

³⁷ Property (Relationships) Act 1976, s 8(1)(e).

³⁸ Property (Relationships) Act 1976, s 10.

family home or family chattels,³⁹ or they have become so intermingled with relationship property, with the express or implied consent of the owner, that it is unreasonable or impracticable to regard that property as separate property.⁴⁰

Consistent with the principle of recognising equal contributions to the partnership, relationship property also includes an increase in value of separate property if the increase is attributable either to the application of relationship property or to the direct or indirect actions of the non-owning partner.⁴¹ Similarly, the proportion of the value of any superannuation scheme entitlement or life insurance policy that is attributable to the relationship is relationship property.⁴²

C Division

Unless the parties have formally contracted out of the Act,⁴³ the presumption is that the relationship property will be divided equally between the parties.⁴⁴ This presumption is subject to three exceptions. The first is where the relationship was of short duration (less than three years);⁴⁵ the second is where there are extraordinary circumstances that make equal sharing repugnant to justice;⁴⁶ and the third is where, after separation, there is likely to be a significant disparity in income and living standards between the parties caused by the division of functions during the relationship.⁴⁷ The second exception is the most relevant to the question of division of ACC entitlements and is the only exception considered here.⁴⁸ Where this exception applies, the relationship property is divided according to the parties' respective contributions to the relationship.⁴⁹

The extraordinary circumstances exception is very difficult to satisfy. It sets a double threshold: there must be extraordinary circumstances and those circumstances must make equal sharing repugnant to justice. The

³⁹ Property (Relationships) Act 1976, s 10(4).

⁴⁰ Property (Relationships) Act 1976, s 10(2).

⁴¹ Property (Relationships) Act 1976, s 9A.

⁴² Property (Relationships) Act 1976, s 8(1)(g) and (f).

⁴³ Property (Relationships) Act 1976, s 21.

⁴⁴ Property (Relationships) Act 1976, s 11.

⁴⁵ Property (Relationships) Act 1976, ss 14-14AA.

⁴⁶ Property (Relationships) Act 1976, s 13.

⁴⁷ Property (Relationships) Act 1976, s 15.

⁴⁸ Under the Matrimonial Property Act 1976, s 14, this exception applied only to the matrimonial home and family chattels. Section 15 of that Act provided for a more liberal exception to equal division for the balance of matrimonial property. See further IVC below. Although the extraordinary circumstances exception now applies to all relationship property, the wording of the section has not changed, and hence the stringent approach adopted under the original Act has continued under the amended Act. As the High Court observed in *De Malmanche v De Malmanche* [2002] 2 NZLR 838 (HC) at [140]: "The lodestar of s 13 remains, but the ocean on which it provides a navigational aid is of greater breadth."

⁴⁹ Property (Relationships) Act 1976, s 13.

strong wording of the section indicates that “the legislature intended to impose a rigorous test, allowing limited scope for unequal sharing”.⁵⁰ The exception is to be applied only to “those abnormal situations that will demonstrably seem truly exceptional”,⁵¹ where the Court simply cannot countenance equal division.⁵²

The exception has been applied in cases where one party has failed to contribute over a reasonable period of time;⁵³ where there is a gross disparity in contributions, especially in a relatively short relationship, as in *Bowden v Bowden*;⁵⁴ and where there has been a major injection of separate property towards the end of the relationship that has become relationship property through intermingling, such as an inheritance used to repay a mortgage on the family home.⁵⁵

III Overview of Accident Compensation Entitlements

A Introduction

This section provides a brief overview of accident compensation entitlements for present purposes.⁵⁶ By ‘accident compensation entitlement’, we mean a person’s entitlement under New Zealand’s accident compensation scheme, whether or not they have yet received it. A person has an accident compensation entitlement under the ACA if they satisfy the criteria for “cover” for a personal injury and in addition meet the specific criteria for the particular “entitlement” in question.⁵⁷ A “personal injury” means a physical injury, mental injury, or death.⁵⁸ “Physical injury” can include gradual process, disease or infection conditions, such as Mr Bowden’s asbestosis, but the grounds for cover for such conditions are narrower than for more common injuries, such as a sprain or a cut.⁵⁹ In Mr Bowden’s case, cover would have been on the

⁵⁰ *Martin v Martin* [1979] 1 NZLR 97 (CA) at 111.

⁵¹ At 102.

⁵² *Castle v Castle* [1977] 2 NZLR 97 (HC) at 102.

⁵³ For example, one party’s negative contributions, such as excessive spending on alcohol and gambling in *Bevan v Bevan* [1977] 1 MPC 23 (SC) and embezzlement in *Pickering v Pickering* (1993) 11 FRNZ 240 (CA); or moral deficiency, as in *Banda v Hart* (1998) 17 FRNZ 667 (FC) and *H v M* (2001) 21 FRNZ 369 (DC). Non-intentional failure to contribute may also constitute an extraordinary circumstance, as in *D v D* (1997) 15 FRNZ 302 (FC), where the wife’s serious mental illness throughout 24-year marriage prevented her from contributing equally to the partnership.

⁵⁴ *Bowden v Bowden*, above n 2. See also *Venter v Trenberth* [2015] NZHC 545, [2015] NZFLR 571 and *Sydney v Sydney* [2012] NZFC 2685.

⁵⁵ *Beuker v Beuker* (1977) 1 MPC 20 (SC); *Weber v Green-Weber* (1990) 6 FRNZ 383 (HC); *Crossan v Crossan* (2003) 23 FRNZ 305 (FC).

⁵⁶ This is an overview rather than a complete or precise account.

⁵⁷ Accident Compensation Act 2001, s 67.

⁵⁸ Accident Compensation Act 2001, s 26.

⁵⁹ Accident Compensation Act 2001, ss 26(2) and s 20(2)(e)–(h).

basis that his condition was work-related.⁶⁰ The most straight-forward ground for cover is 'personal injury caused by accident'. The definition of accident includes "a specific event", such as a motor vehicle crash or a fall.⁶¹ For purposes of this paper we will assume that the recipient of an accident compensation entitlement had cover and focus on the entitlements to compensation arising from cover.

D Categories of entitlement

The ACA divides entitlements into four categories, which are useful divisions for present purposes:

- Rehabilitation entitlements;⁶²
- Lump sum compensation for permanent impairment;⁶³
- Weekly compensation;⁶⁴ and
- Fatal entitlements.⁶⁵

The first three categories of entitlement compensate a person for their own injury, in contrast with fatal entitlements, which a person receives as a result of the death of another person. Weekly compensation, lump sum compensation and fatal entitlements are all compensatory in nature, whereas rehabilitation entitlements are not. The nature and purpose of the entitlements thus differ and require explanation before we consider their treatment in relationship property proceedings.

1 Rehabilitation entitlements

Rehabilitation entitlements reflect the statutory purpose of:⁶⁶

ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation.

Some rehabilitation entitlements take the form of services to the claimant, for example treatment,⁶⁷ home help,⁶⁸ or vocational rehabilitation.⁶⁹ Rehabilitation entitlements may also cover all or part of the cost of acquiring or modifying assets for the purpose of social rehabilitation. For example:

⁶⁰ Accident Compensation Act 2001, s 30 sets out the criteria for cover for personal injury caused by work-related gradual process, disease or infection.

⁶¹ Accident Compensation Act 2001, s 25.

⁶² Accident Compensation Act 2001, sch 1, Part 1.

⁶³ Accident Compensation Act 2001, sch 1, Part 3.

⁶⁴ Accident Compensation Act 2001, sch 1, Part 2.

⁶⁵ Accident Compensation Act 2001, sch 1, Part 4.

⁶⁶ Accident Compensation Act 2001, s 3(c).

⁶⁷ Accident Compensation Act 2001, sch 1, cl 1–6.

⁶⁸ Accident Compensation Act 2001, sch 1, cl 17.

⁶⁹ Accident Compensation Act 2001, sch 1, cl 24–29.

- Aids and appliances,⁷⁰ such as glasses, hearing aids, or a wheelchair;
- Pharmaceuticals;⁷¹
- Transport for independence,⁷² which includes the provision or modification of a vehicle; and
- Housing modifications,⁷³ which could include significant changes to a property, for example off-street parking with carport, lift access, remodeling rooms, construction of a new bathroom, construction of a caregiver's room and provision of access to outside cover.⁷⁴

With respect to both transport for independence and housing modifications, the ACA sets out a series of "rights and responsibilities",⁷⁵ several of which may be relevant in the context of relationship property proceedings:

- ACC is not entitled to recover costs from a claimant if a claimant moves from a modified house⁷⁶ or disposes of a modified vehicle;⁷⁷
- ACC is not required to return a home to its former state if the claimant no longer occupies it,⁷⁸ or to meet the cost of removing vehicle modifications if they are no longer required;⁷⁹
- ACC is not required to modify a home to which the claimant moves from a modified home, unless ACC has already approved those modifications;⁸⁰
- ACC is not required to contribute to a replacement vehicle if a claimant has a need for independence because they have, without reasonable excuse, disposed of the existing vehicle.⁸¹

2 Lump sum compensation for permanent impairment

The lump sum compensation provisions are intended to compensate "those who, through impairment, suffer non-economic loss" because of the covered injury.⁸² "Impairment" is defined as "a loss, loss of use, or

⁷⁰ Accident Compensation Act 2001, sch 1, cl 13.

⁷¹ Accident Compensation Act 2001, sch 1, cl 3(1)(c), pharmaceuticals are classified as a service ancillary to treatment.

⁷² Accident Compensation Act 2001, sch 1, cl 21–22.

⁷³ Accident Compensation Act 2001, sch 1, cl 18–19.

⁷⁴ These example housing modifications were all found in *Witten-Evans v ACC* DC 5/2003, 22 January 2003 to be consistent with the Corporation's obligations to provide social rehabilitation to a twelve year old who suffered cerebral palsy and spastic quadriplegia due to a medical misadventure at birth.

⁷⁵ Accident Compensation Act 2001, sch 1, cl 19 for housing modifications and Accident Compensation Act 2001, sch 1, cl 22 for transport for independence.

⁷⁶ Accident Compensation Act 2001, sch 1, cl 19(4)(b).

⁷⁷ Accident Compensation Act 2001, sch 1, cl 22(5)(b).

⁷⁸ Accident Compensation Act 2001, sch 1, cl 19(3)(g).

⁷⁹ Accident Compensation Act 2001, sch 1, cl 22(2)(c).

⁸⁰ Accident Compensation Act 2001, sch 1, cl 22(3)(i).

⁸¹ Accident Compensation Act 2001, sch 1, cl 22(2)(f)(ii).

⁸² Injury Prevention and Rehabilitation Bill 2000, Explanatory Note at 3.

derangement of any body part, organ system, or organ function”,⁸³ and encompasses loss of mental as well as physical faculties.⁸⁴ The provision of compensation for permanent impairment reflects that, regardless of whether a loss of bodily function has economic consequences, “it is nonetheless a loss to the individual concerned, and in a greater or a lesser degree may adversely affect him thereafter”.⁸⁵

To qualify for a lump sum compensation, the claimant must first be certified as having a permanent impairment which has stabilised, or must wait for two years after the injury if their impairment is not yet stable.⁸⁶ Then, the claimant must have their whole-person impairment assessed as a percentage figure. A claimant is entitled to lump sum compensation if they are assessed as having 10 per cent or more whole-person impairment.⁸⁷ The quantum of the award increases with the level of impairment. An impairment of 80 per cent or more, which Mr Bowden appears to have had, qualifies for the maximum lump sum which, at the time of writing, is around \$133,000.

Lump sum compensation is exactly that: a one-off payment of a sum of money to the claimant to compensate for their permanent impairment for the rest of their life. Impairment can be re-assessed once every twelve months,⁸⁸ which can result in additional payments if the claimant’s whole-person impairment has increased. In that case, the additional payment can be seen as acting as a new lump sum for the additional level of impairment that has developed. An increase in impairment might be because an injury has worsened, or may be the result of the claimant having suffered further injury covered by the ACC scheme.

3 Weekly compensation

The purpose of weekly compensation is to compensate for lost earnings due to injury. Entitlement requires the claimant to have been either an earner or potential earner at the date of injury.⁸⁹ Weekly compensation

⁸³ Accident Compensation Act 2001, s 6.

⁸⁴ There is no provision for compensation for pain and suffering and loss of enjoyment of life, as was the case under the Accident Compensation Act 1972 and Accident Compensation Act 1982.

⁸⁵ Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand *Compensation for personal injury in New Zealand: Report of the Royal Commission of Inquiry* (Wellington, 1967) “The Woodhouse Report” at [291].

⁸⁶ Accident Compensation Act 2001, sch 1, cl 57(1).

⁸⁷ In addition, a claimant must survive their injury by 28 days and be alive when assessed. Accident Compensation Act 2001, sch 1, cl 54(1)(b).

⁸⁸ Accident Compensation Act 2001, sch 1, cl 61.

⁸⁹ Accident Compensation Act 2001, s 100(1). A “potential earner” is defined in s 6 as a claimant who suffered the personal injury before turning 18 or during uninterrupted full time-study or training that commenced before age 18.

is based on eighty per cent of the claimant's pre-injury earnings.⁹⁰ Entitlement to weekly compensation requires the claimant to be incapacitated from work because of their covered injury.⁹¹ Incapacity, and accordingly entitlement to weekly compensation, may not be continuous and can arise some time after the original injury.

4 *Fatal entitlements*

If a person dies as a result of an injury covered by the accident compensation scheme, then various entitlements may be available to their surviving spouse or partner,⁹² as well as their children,⁹³ and other dependants.⁹⁴ An "other dependant" of the deceased is a person other than a child, partner or spouse of the deceased who, because of their physical or mental condition, was financially dependent on the deceased⁹⁵ and is deriving low earnings.⁹⁶ Fatal entitlement are all monetary payments aimed at compensating for economic loss suffered as a result of an accidental death.

(a) Funeral grant

The purpose of a funeral grant is to contribute to the costs of the funeral for someone who dies as a result of a covered injury. A funeral grant is a one-off payment of the lesser of the actual costs of the funeral and a statutory maximum. It is paid to the estate of the deceased claimant.⁹⁷

(b) Survivor's child care payments⁹⁸

The purpose of survivor's child care payments is to assist with the

⁹⁰ Accident Compensation Act 2001, sch 1, cl 32(3). The eighty per cent figure has been a feature of the ACC scheme since its inception, and reflects a balance of considerations, including cost, fair compensation for the individual based on their actual loss, and providing an incentive for recovery. See The Woodhouse Report, above n 85, at [292]. Weekly compensation for potential earners is the higher of 80 per cent of the minimum wage and 125 per cent of the invalid's benefit, see Accident Compensation Act 2001, s 47.

⁹¹ Accident Compensation Act 2001, s 100(2). Entitlement is lost if the claimant undergoes vocational rehabilitation and is assessed as having vocational independence, see Accident Compensation Act 2001, ss 102–106.

⁹² Defined in Accident Compensation Act 2001, ss 18 and 18A respectively.

⁹³ Defined in Accident Compensation Act 2001, s 6.

⁹⁴ Defined in Accident Compensation Act 2001, s 6.

⁹⁵ Accident Compensation Act 2001, s 6.

⁹⁶ To qualify as an "other dependant", a person's earnings must be less than the greater of the minimum wage or 125 per cent of the supported living payment under the Social Security Act 1964: Accident Compensation Act 2001, sch 1, cl 42(3).

⁹⁷ Accident Compensation Act 2001, sch 1, cl 64. The 2017 maximum is around \$6,000. The amount is increased each year based on movements in the Consumer Price Index.

⁹⁸ "Child care payments for children of deceased claimant", to use the statutory language. Accident Compensation Act 2001, sch 1, cl 76.

cost of child care for children of the deceased under the age of 14. The entitlement is to *payments* “for child care”⁹⁹ rather than the provision of child care.¹⁰⁰ Entitlement does not require an assessment of the need for child care, or take into account the deceased’s role in parenting.¹⁰¹ Payments are made weekly until the earlier of five years or the child turning 14.¹⁰² The entitlement is strictly that of the child, but it is paid to the child’s caregiver.¹⁰³

(c) Survivor’s weekly compensation¹⁰⁴

The purpose of survivor’s weekly compensation is to compensate the family for the loss of income that the deceased claimant would have contributed. Survivor’s weekly compensation can be paid to a surviving spouse or partner, children and other dependants of the deceased. Entitled survivors are paid a proportion of the weekly compensation for lost earnings that the deceased would have received had they lived.¹⁰⁵ For surviving spouses and partners, weekly compensation can continue for five years (or longer in certain circumstances including when the spouse or partner has the care of children under 18),¹⁰⁶ and can be aggregated to a one-off payment in advance.¹⁰⁷ A spouse’s entitlement to survivor’s weekly compensation continues even if the surviving spouse enters into a new relationship.¹⁰⁸ For children, it continues until age 18

⁹⁹ Accident Compensation Act 2001, sch 1, cl 76(1).

¹⁰⁰ In contrast with the social rehabilitation entitlement for ACC to “provide or contribute to the cost of child care” for an injured claimant whose injury affects their ability to care for their children (Accident Compensation Act 2001, sch 1, cl 15).

¹⁰¹ Again, in contrast with the social rehabilitation entitlement, which requires consideration of factors such as the need for child care, “the extent to which child care was provided by other household family members before the claimant’s personal injury” and “the extent to which other household family members or other family members might reasonably be expected to provide child care services after the claimant’s personal injury” (Accident Compensation Act 2001, sch 1, cls 15(1)(b), (c) and (d)).

¹⁰² Accident Compensation Act 2001, sch 1, cl 77(2).

¹⁰³ Accident Compensation Act 2001, sch 1, cl 78(1).

¹⁰⁴ The ACA does not use the phrase ‘survivor’s weekly compensation’. The statutory language is “Weekly compensation for...” “surviving spouse or partner” (Accident Compensation Act 2001, sch 1, cl 66); “child” (cl 70), and “other dependants” (cl 71).

¹⁰⁵ That is, survivor’s weekly compensation is calculated based on eighty per cent of the deceased’s pre-injury earnings. Partners can receive up to sixty per cent of that eighty per cent, children and other dependants up to 20 per cent each. Accident Compensation Act 2001, sch 1, cl 66, 70, 71 and 74.

¹⁰⁶ Accident Compensation Act 2001, sch 1, cl 66(5). Clause 66(4)(b) provides that The Corporation must not cancel or suspend the surviving spouse’s or partner’s weekly compensation— (a) because the spouse or partner marries, enters into a civil union, or enters into a de facto relationship.

¹⁰⁷ Accident Compensation Act 2001, sch 1, cl 67.

¹⁰⁸ Accident Compensation Act 2001, sch 1, cl 66.

(or 21 if in full-time study).¹⁰⁹ For other dependants, it continues until the other dependant's earnings from other sources increase, or the other dependant starts receiving New Zealand superannuation.¹¹⁰

(d) Survivor's grants

The purpose of a survivor's grant is to recognise that a death in a family results in a "need for immediate cash" to address death-related expenses in addition to those for which there are already specific entitlements.¹¹¹ A survivor's grant is a one-off lump sum payment, payable to a surviving spouse or partner, any child under 18, and any other dependant of the deceased.¹¹² At the time of writing, the grant to a spouse or partner is around \$6,500 and the grant to each child under 18 or other dependant is around \$3,200. Entitlement to a survivor's grant is contingent only on having a qualifying relationship to the deceased. It is not based on an assessment of loss or need.

In the next section we consider how the courts have treated these various entitlements in proceedings under the PRA on separation and on death of a spouse or partner.

IV How accident compensation entitlements have been dealt with under the PRA

This section sets out how the courts have dealt with accident compensation entitlements in relationship property proceedings by considering:

- a. Whether accident compensation entitlements are 'property' under the PRA?
- b. If so, how are they classified?
- c. If they are classified as relationship property, how are they divided?

A Are accident compensation entitlements 'property' under the PRA?

The courts have had no difficulty treating accident compensation entitlements as property, which is clearly correct. Obviously, a payment that ACC has made into a claimant's bank account is property, and assets that have been provided or modified for the purposes of rehabilitation are property. An entitlement is also property at the point at which the claimant has acquired the right to receive it, even if it has not yet been provided. The District Court took this approach in *Storer v Storer*, finding that an interest in payment of lump sum compensation was property that

¹⁰⁹ Accident Compensation Act 2001, sch 1, cl 70(5).

¹¹⁰ Accident Compensation Act 2001, s 72.

¹¹¹ Hon W F Birch *Accident Compensation: A Fairer Scheme* (Wellington, 1991) at 54. See also Ministerial Working Party on the Accident Compensation Corporation and Incapacity Report (Wellington, 1991) at 88.

¹¹² Accident Compensation Act 2001, sch 1, cl 65. The clause explicitly allows for the possibility of multiple spouses or partners. If there is more than one surviving spouse or partner, the amount is divided equally between them.

was acquired prior to the payment actually being made.¹¹³ Alternatively, one could classify an entitlement to an accident compensation payment as a 'thing in action'. An entitlement to quarterly independence allowance payments was described as a "chose in action" in *ACC v Bailey*,¹¹⁴ albeit not in the relationship property context, and "a thing in action is simply a modern rendering of what is conventionally called a chose in action", as Tipping J put it in *Gill v Gill*.¹¹⁵ Regardless of whether an accident compensation entitlement is classified as a 'thing in action' or 'other right or interest' in the definition of 'property' in the PRA, it is incontrovertibly property and has been treated as such. The more important questions for present purposes relate to the classification and division of accident compensation entitlements.

B How have accident compensation entitlements been classified under the PRA?

Classification of property on separation differs from classification when a relationship ends on death.

1 Accident compensation entitlements on separation

On separation, classification of accident compensation entitlements made to an injured spouse or partner has arisen mostly in relation to lump sum payments for permanent impairment, pain and suffering. For purposes of classification under the PRA, the decisive question is the date when the entitlement was acquired. Section 8(1)(e) of the PRA provides that "all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began" is relationship property. If an entitlement to accident compensation is acquired before a relationship commences, then the payment is separate property even if it is made during the relationship, because the payment is property acquired out of separate property.¹¹⁶ Conversely, if an entitlement arises during a relationship, the payment is relationship property, even if it is paid after separation, because the payment is property acquired out of

¹¹³ *Storer v Storer* (1984) 3 NZFLR 88 (DC) at 91.

¹¹⁴ *ACC v Bailey* DC Christchurch 152/2007 10 July 2007 at [21]. The case was concerned with the Corporation's practice of offering claimants a "single payment option" of a lump sum payment instead of five years' worth of quarterly independence allowance payments, pursuant to Accident Compensation Act 2001, s 123(2)(b), which allows the assignment of an independence allowance to the Corporation for no more than five years. Prior to *Bailey*, the Corporation advised clients taking up the single payment option that they gave up the right to seek reassessment during the five year period. The District Court found that the ACA only authorised the assignment of the right to independence allowance payments, and not the claimant's bundle of rights associated with the independence allowance, including the right to reassessment (see [21]–[22]).

¹¹⁵ *Gill v Gill* (1995) 13 FRNZ 427 (HC) at 433.

¹¹⁶ Property (Relationships) Act 1976, s 9(2).

relationship property.¹¹⁷ The facts of *Storer v Storer* illustrate the latter case.¹¹⁸ During his marriage, Mr Storer lost an eye as a result of a motor vehicle accident. He was paid lump sum compensation in relation to his eye injury after he had separated from his wife, but the compensation was still held to be relationship property.

The courts have rejected the proposition that the purpose of an entitlement is relevant to its classification. In *Pope v Pope*, Hardie Boys J dismissed an argument, which he described as being presented “with no less courage than ingenuity”, that an accident compensation payment was separate property because it was acquired out of separate property, that separate property being the appellant’s body.¹¹⁹ Similarly, in *Shapleski v Shapleski*, the Court rejected a submission that lump sum compensation was personal to the recipient and should be viewed as different from other payments of personal funds.¹²⁰ The PRA’s classification provisions do not allow the courts to differentiate between the different types of accident compensation. In regard to lump sum compensation the only issue for purposes of classification under the PRA is when the entitlement was acquired.

There has been some debate in relation to determining the date of acquisition of an accident compensation entitlement, which affects classification. Some courts have taken the date when the injury first arose as the relevant date. That is consistent with the approach taken to determining the date of accrual of a cause of action, which is generally the date on which all the material facts required for a claim to succeed have occurred, regardless of whether or not the plaintiff was actually aware of those facts.¹²¹ The facts of *Gill v Gill* provide a useful illustration of that principle in a relationship property context. Prior to her marriage, Mrs Gill was fitted with a defective contraceptive device that caused harm to her before as well as during her marriage. The cause of action accrued as soon as more than negligible harm had been done, which was before the marriage, and accordingly the resulting civil damages payment was separate property.¹²² In other cases the courts have used the date on which the ACA deemed the injury to have occurred. In *Bowden v Bowden*, for example, the High Court disagreed with the Family Court that the entitlement arose when Mr Bowden was first exposed to asbestos many years before his relationship with the applicant began. The relevant date was the date on which the ACA deemed Mr Bowden to have suffered the injury, which was the date of diagnosis in 2010, when he was living

¹¹⁷ Property (Relationships) Act 1976, s 8(1)(l).

¹¹⁸ *Storer v Storer*, above n 113.

¹¹⁹ *Pope v Pope* HC Nelson M8-83, 20 July 1983, at 5–6.

¹²⁰ *Shapleski v Shapleski* HC Hamilton AP34/91, 10 April 1992, at 6.

¹²¹ *Bowden v Bowden*, above n 2, at [71].

¹²² *Gill v Gill*, above n 115, at 432–433. See also the Family Court decision in *Bowden v Bowden* (FC), above n 3, at [124].

in a de facto relationship with Ms Bowden.¹²³ As a result, the lump sum payment was relationship property.

The date of the entitlement is also likely to determine the classification of earnings-related compensation, but we are not aware of any cases where sharing of future earnings-related compensation has been addressed.

Wiseman v Wiseman is the only case that we are aware of where rehabilitation payments were part of a relationship property claim. Mr Wiseman was left paraplegic as a result of a motor vehicle accident. ACC funded modifications to the family home and a car to enable him to be more independent.¹²⁴ As the family home and family chattels are relationship property whenever they were acquired, the date of his entitlement did not affect the classification of the assets.¹²⁵ Nor is there scope within the PRA to treat the increase in value of the home attributable to the modifications as the husband's separate property.¹²⁶

2 Accident compensation entitlements on death

When a marriage, civil union, or de facto relationship ends on death, the PRA operates somewhat differently. It does not treat the parties to the relationship alike. Only the surviving spouse or partner may apply as of right for a division of property under the PRA by electing option A.¹²⁷ The personal representative of the deceased requires leave from the Court to apply for a division of relationship property, which may be granted only if serious injustice would otherwise result.¹²⁸ The most common reason for seeking leave is to recover relationship property from the surviving spouse or partner for the benefit of children from the deceased's former relationship.¹²⁹ For example, if Mr Bowden had left his entire estate to his surviving de facto partner, or if she had taken his assets by survivorship, his son might well have applied for leave to claim his father's share of

¹²³ *Bowden v Bowden* (FC), above n 3, at [79].

¹²⁴ *Wiseman v Wiseman* [1985] 1 NZLR 756 (CA).

¹²⁵ Property (Relationships) Act 1976, s 8(1)(a) and (b).

¹²⁶ This would be the converse of s 9A Property (Relationships) Act 1976, which classifies increases in value of separate property as relationship property when the increase is attributable to the application of relationship property or the actions of the non-owning spouse or partner.

¹²⁷ Property (Relationships) Act 1976, s 61. Option B is not applying for a division, in which case the surviving spouse or partner retains any assets he or she owns, takes the benefit of any property passing by survivorship and inherits under the deceased's will or the intestacy rules. If the surviving spouse or partner elects option A, any gifts under the will or intestate entitlement is automatically revoked: Property (Relationships) Act 1976, s 76. The Court has discretion to reinstate some or all of the inheritance if that is necessary to avoid injustice: Property (Relationships) Act 1976, s 77.

¹²⁸ Property (Relationships) Act 1976, s 88(2).

¹²⁹ For example, *Public Trust v Whyman* [2015] 2 NZLR 696 (CA).

the relationship property so that he could make a Family Protection claim against his father's estate.¹³⁰

If the surviving spouse or partner elects option A, as Ms Bowden did, the classification provisions that would apply on separation are modified.¹³¹ All the property that Mr Bowden owned when he died is presumed to be relationship property including anything acquired by his estate after death, other than property that he received by way of gift, inheritance, survivorship, or as a beneficiary of a trust settled by a third party.¹³² The person disputing that classification has the burden of rebutting the presumption.¹³³ In *Bowden v Bowden* it would have been up to the deceased's son to prove that the lump sum payment his father received was separate property, in which case the son would have retained the balance of the payment as the surviving joint tenant of the account. Although the judgment makes no mention of this modification to the classification provisions in s 8, it would not have affected the outcome in this case. The payment was held to be relationship property and the son was therefore unable to take the full benefit of the survivorship rule.

If the deceased's lump sum payment had passed to Ms Bowden by survivorship, it would also have been relationship property, rather than her separate property. Section 83 of the PRA provides that any property passing to the surviving spouse or partner by survivorship or otherwise (but not by succession) has the same status it would have had if the deceased had not died, unless the Court decides otherwise.¹³⁴

If a partner's death was accidental, fatal entitlements might be payable. We are not aware of any case law dealing with classification of such entitlements under the PRA, but in our view those entitlements will not usually be relationship property. The funeral grant is likely to be separate property of the deceased, because it relates to the payment of a personal

¹³⁰ He might well have succeeded, because the parent child relationship has primacy in New Zealand society: *Flathaug v Weaver* [2003] NZFLR 730 (CA) at [32]; *Public Trust v Whyman*, above n 129, at [48], where the Court of Appeal criticised the Court's refusal to grant leave in *Re Williams* [2004] 2 NZLR 132 (HC), thus preventing the deceased's daughter from enforcing payment of her Family Protection award.

¹³¹ Property (Relationships) Act 1976, ss 75, 81–84. As s 75 refers specifically to option A, it is not clear whether the modifications apply when the claim is made by the personal representative of the deceased.

¹³² Property (Relationships) Act 1976, ss 81 and 82.

¹³³ In *Bowden v Bowden*, above n 2, s 81 should have been applied, placing the onus on the deceased's son to rebut the presumption that his father's ACC entitlement was relationship property. But the Court did not refer to that provision, applying instead the inter vivos classification provisions in s 8. The Court would have come to the same result if it had applied s 81.

¹³⁴ *B v Adams* (2005) 25 FRNZ 778 (FC) is one of the few cases where the Court has had the opportunity to exercise its discretion to allow the survivorship rule to apply to a holiday home registered in the parties' joint names, because it was just to do so in the circumstances.

debt of the deceased.¹³⁵ The survivor's child care payments would not be relationship property, because the entitlement is that of the child, not the surviving spouse or partner. The survivor's grant and the survivor's weekly compensation entitlement will not be relationship property if they are paid to the surviving spouse or partner of the deceased, because these entitlements arise after the relationship has ended.¹³⁶ Section 84 of the PRA does give the Court discretion to treat property acquired by a surviving partner after death as relationship property if it is just to do so. But it seems unlikely that the Court would do so, given that the purpose of this entitlement is to compensate the survivor for loss of income.

C How are accident compensation entitlements divided under the PRA?

It is apparent from the case law that the courts recognise the potential injustice resulting from classifying accident compensation entitlements as relationship property and have sought to address that injustice by invoking exceptions to the presumption of equal division. That was easier to do under the Matrimonial Property Act 1976 ('the MPA') than it is now under the PRA. Under the PRA, all relationship property is shared equally unless there are extraordinary circumstances that would make equal sharing repugnant to justice,¹³⁷ whereas under the MPA this exception applied only to the matrimonial home and family chattels.¹³⁸ Non-domestic property could be unequally divided under the MPA if one spouse's contributions to the marriage were clearly greater than those of the other spouse, in which case the property was divided according to the spouses' respective contributions to the marriage partnership.¹³⁹

There are several cases under the MPA where this more liberal exception was applied to the division of matrimonial property that included a substantial accident compensation payment.¹⁴⁰ In *Fieldes v Fieldes*, for example, the Court held that a lump sum payment made to the injured husband as compensation for the accidental loss of bodily function and enjoyment of life could "conveniently be taken as the extent of his greater contribution to the marriage partnership".¹⁴¹ Accordingly,

¹³⁵ Property (Relationships) Act 1976, s 20 defines a 'personal debt' as a debt that is not a 'relationship debt' and a funeral grant does not come within any of the five categories of a relationship debt.

¹³⁶ Property (Relationships) Act 1976, s 84.

¹³⁷ Property (Relationships) Act 1976, s 13. This exception applies also on death.

¹³⁸ That is, the matrimonial home and family chattels are shared equally (Matrimonial Property Act 1976, s 11) unless there are extraordinary circumstances that would make doing so repugnant to justice (s 14).

¹³⁹ Matrimonial Property Act 1976, s 15.

¹⁴⁰ *Walker v Walker* (1979) 3 MPC 189 (SC) (the payment in that case was a civil compensation payment) at 191–192, *Fieldes v Fieldes* (1984) 1 FRNZ 272 (HC), at 276, *Law v Law* DC Whakatane FP 335/82 September 1983, (1984) 10(2) NZ Recent Law 60, *Storer v Storer*, above n 113, at 92–93 and *Pope v Pope*, above n 119, at 8.

¹⁴¹ *Fieldes v Fieldes*, above n 140, at 276.

the injured husband's share of the matrimonial property was the value of the accident compensation payment plus one half of the balance of the matrimonial property.

A notable exception is *Shapleski v Shapleski*, where the High Court overturned a judgment of the Family Court that took the approach described above.¹⁴² In *Shapleski* the wife had brought \$18,000 of her own money into the marriage, which was significantly more than the husband's \$13,000 lump sum ACC payment. The High Court found that the Family Court had erred in singling out the injured husband's accident compensation.¹⁴³ Taking into account the wife's contributions, the husband's contribution was no longer clearly greater.

The extraordinary circumstances exception is more difficult to establish, but has been successfully invoked both in relation to the matrimonial home and family chattels and, since the amendments in 2001, to non-domestic property. Several cases identified the personal nature of lump sum compensation payments as an important reason for concluding that equal sharing would be repugnant to justice. In each case, the court also identified other reasons that made equal sharing repugnant to justice, perhaps to avoid the impression that the exception was being used to address the inflexibility of the classification provisions.

In *Pope v Pope*, for example, Hardie Boys J found that, in contrast to earnings-related compensation, lump sum compensation was "entirely personal" and intended to compensate the injured husband for losses he would suffer "for the remainder of his days".¹⁴⁴ His Honour also noted that the payment was made near the end of the marriage, which has long been a good reason for applying the extraordinary circumstances exception to avoid equal division.¹⁴⁵

Judge Bisphan was similarly concerned about the personal nature of the compensation paid to the husband in *Storer v Storer*. His Honour found that the accident that resulted in the husband's loss of an eye was an extraordinary circumstance and that equal sharing of the compensation would be repugnant to justice. The accident compensation payments "were paid to the husband to compensate him for the suffering, losses and impairment which he endured at the time and will endure for the rest of his life as a result of the accident".¹⁴⁶ He also received the payment well after the parties ceased living together.

In *Wiseman v Wiseman*, the Court of Appeal also considered the personal nature of the compensation paid to Mr Wiseman following an accident that left him paraplegic. He used part of his lump sum compensation to reduce the mortgage on the family home and the Corporation outlaid \$11,000 for modifications to the home to allow him to become more

¹⁴² *Shapleski v Shapleski*, above n 120.

¹⁴³ *Shapleski v Shapleski*, above n 120, at 7–8.

¹⁴⁴ *Pope v Pope*, above n 119, at 9.

¹⁴⁵ See II C above.

¹⁴⁶ *Storer v Storer*, above n 113, at 92–93.

independent. Those modifications improved the value of the family home by \$9,000. Mr Wiseman's father spent a further \$16,000 on the family home for the installation of a heated pool to provide therapy for his son. Somers J, giving judgment for the Court, stated that:¹⁴⁷

The features which stand out in this narrative are that moneys received as compensation for the grossest of physical disabilities – in part paid for loss of amenities and in part for economic loss – have been outlaid by the husband on the home and family chattels along with other moneys having their source in human compassion. The total is large – over \$40,000 – and non-recurrent... The circumstances, including the receipt of moneys by the husband and the manner of their expenditure by him, the improvements effected to the home by the Accident Compensation Commission, the sources of such moneys and modifications and the reasons which occasioned the payments and work are together in our opinion so extraordinary as to render an equal sharing of the home repugnant to justice.

The personal nature of lump sum compensation was not considered in *Bowden v Bowden* by either the Family Court or the High Court, making the decision something of an anomaly. The Family Court found that there were extraordinary circumstances that made equal sharing repugnant to justice without taking into account the accident compensation payment, having found that the payment was Mr Bowden's separate property. The High Court overruled the Family Court on the classification point, deciding that the accident compensation payment was relationship property, but upheld the Family Court on the unequal division ruling without reassessing the parties' relative contributions to the significantly increased pool of relationship property.¹⁴⁸ The reason for this oversight is not obvious. Perhaps Mr Bowden's death alleviated concern about the unfairness of equally sharing a payment intended to compensate one partner for impairment that they would carry with them after the end of the relationship.

Two broad propositions emerge from this case law. The first is that accident compensation entitlements are "simply property" in the eyes of the PRA, as Hardie Boys J put it in *Pope v Pope*,¹⁴⁹ and are relationship property if acquired during a relationship. The second is that the personal nature of compensation payments is considered at the division stage, when it can justify unequal sharing (or, indeed, any sharing at all) of such compensation payments. In the next section, we argue that the PRA and ACA are misaligned, and the conflict between these two propositions is a symptom of that problem, for which we propose reform in the final section of this article.

¹⁴⁷ *Wiseman v Wiseman*, above n 124, at 758. The 'Accident Compensation Commission' is the precursor to today's Accident Compensation Corporation. At the time, the accident compensation scheme was administered by the Accident Compensation Commission rather than today's Accident Compensation Corporation.

¹⁴⁸ *Bowden v Bowden*, above n 2, at [54]–[56].

¹⁴⁹ *Pope v Pope*, above n 119, at 6.

V Misalignment of the PRA and ACA

The PRA and ACA are configured to pursue very different goals. The purpose of the PRA is to recognise the parties' equal contributions to their partnership, and to provide for a just distribution of property associated with the partnership when the relationship ends.¹⁵⁰ To this end, the PRA takes an inclusive approach to what counts as property, and to what property is classified as relationship property. The purposes of the ACA include providing a fair and sustainable accident compensation scheme that seeks to rehabilitate injured persons to the maximum extent practicable and to provide fair compensation for loss including weekly compensation for lost earnings and lump sums for permanent impairment.¹⁵¹ To that end, the ACA provides for the determination of cover and the provision of entitlements in a manner that is aimed at achieving fairness for both the injured person and the community bearing the costs of the scheme.

When accident compensation entitlements have to be considered in the context of relationship property proceedings, the courts are compelled to give priority to the PRA over the ACA because s 4A of the PRA states:

Every enactment must be read subject to this Act, unless this Act or the other enactment expressly provides to the contrary.

There is no express contrary provision in either the PRA or the ACA. Hence, when a relationship ends, the courts are bound to classify accident compensation entitlements like any other property of a spouse or partner, without regard to the special nature of these entitlements.

However, there are several sections of the ACA that point to a contrary conclusion. Section 123(1) provides that:

All entitlements are absolutely inalienable, whether by way of, or in accordance with, a sale, assignment, charge, execution, bankruptcy, or otherwise.

Furthermore, s 124(1) provides that:

The Corporation must provide entitlements only to the claimant to whom the Corporation is liable to provide the entitlements.

These sections are subject to exceptions, and allow deductions from accident compensation payments for, among other things, child support and attachment orders made under the District Courts Act 1947. There is no exception for the Property (Relationships) Act 1976, even though the classification of an accident compensation entitlement and its division

¹⁵⁰ Property (Relationships) Act 1976, s 1M.

¹⁵¹ Accident Compensation Act 2001, s 3.

under the PRA would appear to constitute an alienation.¹⁵² While this form of alienation is not a breach of the ACA, because the PRA trumps all other enactments, the courts' approach to division of relationship property indicates an appreciation of the conflict between the policies underpinning these two statutes.¹⁵³ This conflict is evident in the Family Court decision in *Shapleski v Shapleski*, where the Court referred to the personal nature and the inalienability of the compensation as the reason for allocating the lump sum payment to the husband before dividing the balance of the couple's matrimonial property equally between them.¹⁵⁴ Other than earnings-related compensation, the accident compensation entitlements are not contributions to the partnership and therefore ought not to be classified as relationship property. But that classification is not open to the courts under the current Act. The only option they have, to recognise the personal nature of an accident compensation entitlement is to rely on the extraordinary circumstances exception to equal division, even though it is questionable whether an accidental injury is indeed an extraordinary circumstance to justify applying the exception.

Another symptom of misalignment of the PRA and ACA is the difficulty that the courts have had in determining the date of acquisition of an accident compensation entitlement which is crucial in ascertaining whether or not the entitlement is relationship property. In *Bowden v Bowden*, Mander J found that Mr Bowden's entitlement to lump sum compensation was acquired on the date that the ACA deemed his injury to have occurred. Under the ACA, the date of injury is important for several reasons. For example, cover is generally not available for injuries suffered before the commencement of the scheme on 1 April 1974.¹⁵⁵ To reflect the practical need to affix *some* date of injury to injuries where there is no clear date of injury, such as asbestosis that develops gradually over a long period after exposure, the ACA provides machinery that deems the date of injury for certain types of injuries. As Heron J observed in *Bryant v Attorney-General*, the deemed date of injury is a "convenient fiction for the fairer and better administration of the Act".¹⁵⁶ But there is no reason to expect that the deemed dates of injury that Parliament has

¹⁵² The few accident compensation cases on these sections are not of particular assistance in the present context. *ACC v Bailey*, above n 114. *Murray v ARCIC* DC Wellington 103/97 DCA 187/96 May 23 1997, which was concerned with the recovery of debt by the Corporation from entitlement payments to the claimant, which is specifically authorised by the ACA.

¹⁵³ For a different example of a policy conflict between the ACA and another statute, see *Davies v Police* [2009] NZSC 47, [2009] 3 NZLR 189, where a majority of the Supreme Court interpreted the Sentencing Act 2002 to give effect to their understanding of the philosophy of the ACC scheme. This was at the expense of the goals of the Sentencing Act and *Davies* was overturned by Parliament, see Simon Connell "Overturning the Social Contract?" [2014] NZLJ 314.

¹⁵⁴ *Shapleski v Shapleski* DC Thames FP 875/16/88, 9 April 1991, at 7.

¹⁵⁵ Accident Compensation Act 2001, s 359.

¹⁵⁶ *Bryant v Attorney-General* HC Wellington CP44-00, 7 August 2000.

crafted for particular types of injury should also happen to produce just results in relationship property cases.

The PRA and ACA are therefore misaligned on a number of levels. Consequently, we advocate law reform, which we consider in the next section.

VI Reform

A General approach

In November 2015, the PRA was referred to the New Zealand Law Commission for review and reform, with a reporting date of November 2018.¹⁵⁷ The terms of reference are very broad and include the classification and division of property. So this is an opportune time to consider the issue of accident compensation entitlements in relationship property proceedings. As will be apparent from the foregoing analysis, the nature and purpose of the various entitlements differ and hence we deal with each entitlement separately in the following reform proposals.

Since section 4A of the PRA provides that other enactments are to be read subject to the PRA, it is primarily the PRA that ought to be revised to implement the proposed reforms. For the purposes of clarity, s 123(2) of the ACA could also be amended to include in the list of things to which inalienability does not apply “sections 8–10 or part 4 of the Property (Relationships) Act 1976”.¹⁵⁸

B Rehabilitation entitlements

Generally speaking, we consider that rehabilitation entitlements ought to be classified as separate property. This reflects both the personal nature of most rehabilitation entitlements and the undesirability of undermining an injured person’s rehabilitation by making entitlement to rehabilitation subject to division. This change could be achieved quite easily in relation to personal aids and appliances, such as hearing aids, prosthetics and wheel chairs, by specifically classifying such assets as separate property.

A different approach would be required in relation to modifications to the family home and vehicle. If the family home and family chattels retain their special status under the PRA,¹⁵⁹ the modifications and resulting increase in value will be relationship property in the absence of a contracting out agreement. Securing the rehabilitation entitlement for the injured spouse or partner through classification of the assets is likely

¹⁵⁷ <www.lawcom.govt.nz/our-projects/review-property-relationships-act-1976>.

¹⁵⁸ Sections 8–10 classify property and part 4 deals with division of relationship property.

¹⁵⁹ Robert Fisher “Should a property regime be mandatory or optional?” in Jessica Palmer, Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Modern Family Finances – Legal Perspectives* (Intersentia, Cambridge) (forthcoming), suggests that only the fruits of the partnership should be classified as relationship property. That would exclude the family home and family chattels acquired before the relationship began.

to be problematic. There can be no assumption that the rehabilitation entitlement is reflected in a corresponding increase in value that might be classified as separate property. A modification to a vehicle may even have diminished its value. We propose instead that the injured party's rehabilitation payment is dealt with through division, either by deducting the cost of the rehabilitation payment or vesting the asset in the injured person subject to a compensation payment to the spouse or partner for the loss of that item of relationship property. This would enable the injured person to continue benefiting from entitlements intended to assist his or her rehabilitation in accordance with the purpose of the ACA.

C Lump sum compensation for permanent impairment

In our view, lump sum compensation for permanent impairment should always be classified as separate property at the point of acquisition, because it is paid with respect to a purely personal loss of one's bodily function. Furthermore, it is made as a one-off payment for the loss that the injured person will suffer for the rest of his or her life, making it unjust for an ex-partner to share in that payment at the end of a relationship.

As well as providing for a more just outcome, this reform circumvents the problem referred to earlier of affixing a date of acquisition to lump sum compensation. The definition of separate property in s 9 of the PRA should be amended to include entitlement to lump sum compensation under cl 54 of Schedule 1 of the Accident Compensation Act 2001.

If the recipient subsequently intermingles the lump sum compensation payment with relationship property, it becomes relationship property in the same way as an inheritance or a gift would do under s 10 of the PRA. The personal nature of the payment may nonetheless justify unequal division of the relationship property, as it did in *Wiseman v Wiseman*.

D Weekly compensation

In our view, weekly compensation acquired during a relationship should be relationship property because it is compensation for lost earnings that would have been relationship property had the claimant not been injured. The PRA does not need to be amended to achieve this result. However, there would be benefit in providing clarity on the date of acquisition of an entitlement to weekly compensation, given the different approaches that have emerged in the context of lump sum compensation.

We consider that the accident compensation context requires a different approach to the one that the High Court took to post-relationship payments under a disability insurance in *Creighton v Creighton*.¹⁶⁰ While Dr and Mrs Creighton were married, they used relationship funds to enter into a disability insurance policy to insure Dr Creighton against prospective loss of income. While still married, he was diagnosed with a serious degenerative neck and upper spine condition, which led to the insurer paying him continuous monthly benefits under the policy. It was

¹⁶⁰ *Creighton v Creighton*, HC Auckland, CIV-2003-404-6892, 10 September 2004.

accepted that the payments under the policy were relationship property while the couple lived together in marriage. The High Court found that the ongoing right to receive payments (provided that Dr Creighton continued to meet the criteria for payment, which was almost certain) was also relationship property, on the basis that the right to payment had arisen during the relationship, and no new or fresh rights arose after separation.¹⁶¹ Dr Creighton's argument that the post-relationship lost income payments should be separate property because post-relationship income would be separate property was rejected on the basis that Mrs Creighton was claiming an interest in an insurance policy against lost income that had been purchased from relationship property, rather than claiming any interest in Dr Creighton's future income.¹⁶²

In our view, the same reasoning should not apply to earnings-related weekly compensation under the ACA. The deliberate choice by a couple to purchase an insurance policy using relationship property should be distinguished from the compulsory social insurance accident compensation scheme. Furthermore, the funding of the accident compensation scheme is more complex than an individual paying insurance premia from relationship property funds, and it is not always the case that accident compensation payments will come from a fund that the injured person actually contributed to.¹⁶³

We suggest that, in the relationship property context, weekly compensation should be treated as being acquired as a result of periods of incapacity, in the same way that earnings from work are acquired as a result of periods of working. Effectively, a fresh entitlement to a weekly compensation arises for each day that the claimant meets the criteria for entitlement. Weekly compensation paid for periods of incapacity outside a relationship should be separate property. This produces a more just outcome, and one that more closely resembles the way that ACA deals with earnings-related compensation, than affixing a single date of entitlement to weekly compensation based on the date of injury or date of payment.

Weekly compensation payments received after the end of a relationship for an injury suffered during the relationship would be relationship

¹⁶¹ At [25].

¹⁶² At [39]–[40].

¹⁶³ For example, entitlements for work-related personal injuries are paid out of the Work Account, which is funded by levies paid by employers (Accident Compensation Act 2001, ss 167–168). So, a person receiving entitlements for a work-related injury has not paid levies into the fund that their entitlements are paid from. Even in the case that a claimant is injured in an accident that relationship money could be said to have helped fund the account (for example a motor vehicle accident – the funding for which comes from vehicle registrations and petrol levies), the ACA makes it clear that there is no direct relationship between levy-paying and entitlements: s 59(1) states that “[t]he fact that the Corporation accepts a levy does not of itself decide the question of whether or not a person has cover” and having paid levies is not a requirement for receiving entitlements (s 67).

property only to the extent that the payments related to any period before the relationship ended. To the extent that payments are intended to cover loss of earnings after separation they would be separate property of the injured party. Similarly, a back-payment of weekly compensation received during a relationship with respect to a period of incapacity prior to the relationship would be separate property. Conversely, a back-payment of weekly compensation received after a relationship in respect of a period of incapacity during the relationship would be relationship property.¹⁶⁴

E Fatal entitlements

Funeral grant

A funeral grant is paid to the estate of the deceased. Section 82 of the PRA states that property acquired by the estate of a deceased spouse or partner is presumed, in the absence of evidence otherwise, to be relationship property. It could thus be argued that a funeral grant is relationship property and subject to sharing. However, that would undermine the purpose of the funeral grant which is to offset actual funeral costs. Under the PRA as it currently stands, a funeral grant could be said to be separate property either on the basis that it is property against which the normal presumption in s 82 should not apply, or on the basis that it is a contribution to the payment of a personal debt of the deceased under s 20 of the PRA. To clarify the status of funeral grants, s 82 of the PRA could be amended to exclude funeral grants paid under the ACA from being relationship property.¹⁶⁵

Survivor's child care

Survivor's child care is paid to the caregiver of the child of the deceased.¹⁶⁶ As the caregiver is not beneficially entitled to this payment, it would not be property to which the PRA would apply if the caregiver was in a relationship when the childcare payments were made.¹⁶⁷ The PRA could be amended to clarify this.

Survivor's weekly compensation

The purpose of survivor's weekly compensation is to compensate for lost income and should be treated like income by the PRA. That is, survivor's weekly compensation should be relationship property if the recipient is in a qualifying relationship with another person at the time

¹⁶⁴ A subsequent payment might justify setting aside a settlement agreement under s 21J of the PRA.

¹⁶⁵ Property (Relationships) Act 1976, s 82(4) could be amended to include a reference to funeral grants.

¹⁶⁶ Accident Compensation Act 2001, sch 1 cl 78.

¹⁶⁷ Property (Relationships) Act 1976, s 2 definition of "owner".

when entitlement is acquired.¹⁶⁸ That takes us back to the issue discussed previously in relation to weekly compensation for an injured person, where we rejected the *Creighton* approach and argued instead that each weekly payment is a fresh acquisition.

In our view, the *Creighton* approach is appropriate for survivor's weekly compensation, because it differs from weekly compensation for an injured person in several material respects. Eligibility for an injured person depends on actual lost income, evidenced by incapacity, and fluctuates depending on changing circumstances. Survivor's weekly compensation, on the other hand, does not depend on the survivor's circumstances to the same extent. It does not require evidence of ongoing lost income.¹⁶⁹ For example, if the survivor marries or enters into a relationship, that will not affect the entitlement to the survivor's weekly compensation, regardless of the income brought in by the partner.¹⁷⁰ Furthermore, it is irrelevant whether the deceased would have reached retirement age, and thus be eligible for superannuation, mitigating any lost income due to injury.¹⁷¹ For these reasons, the Accident Compensation Act 2001 allows a surviving spouse or partner to convert their entitlement to survivor's weekly compensation to one or more aggregated payments.¹⁷² For the same reasons survivor's weekly compensation should be treated by the PRA as a one-off entitlement acquired on the date of death, rather than a series of fresh acquisitions. Its classification should therefore depend on whether at the date of death the recipient of the weekly compensation was in a qualifying relationship or not.

Survivor's grants

Survivor's grants should be classified as separate property, even when

¹⁶⁸ The possibility of survivor's weekly compensation becoming subject to the Property (Relationships) Act 1976 is more likely to occur where dependants receive the entitlements, because there is no age restriction on dependants, whereas children of the deceased are eligible to receive fatal entitlements only until they attain the age of 18 or, if they are in full time study, the age of 21. Given the age restrictions on marriage, civil unions, and de facto relationships, children are unlikely to be receiving fatal entitlements or their relationship will be of short duration: Property (Relationships) Act 1976, ss 14–14AA. As we mentioned at the end of our discussion of the division of accident compensation entitlements on death, theoretically, the personal representative of the deceased could request that the court classify survivor's weekly compensation paid to a spouse or partner as relationship property in the relationship with the deceased under Property (Relationships) Act 1976, s 84. Bringing the survivor's grant into the pool of relationship property would then potentially make it subject to a claim under the Family Protection Act 1955. It seems unlikely that such a request would ever be made and even less likely that a court would grant it.

¹⁶⁹ With compensation for other dependants being the exception.

¹⁷⁰ Accident Compensation Act 2001, sch 1, cl 66(4)(a).

¹⁷¹ Accident Compensation Act 2001, sch 1, cl 66(4)(c).

¹⁷² Accident Compensation Act 2001, sch 1, cl 67.